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Public Prosecutor v Trans-Coastal Sdn Bhd and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-09–180–04 OF 2022 AND B-09–231–09 OF 2023
HADHARIAH SYED ISMAIL, AZMAN ABDULLAH AND AZMI ARIFFIN JJCA
13 MAY 2024

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Customs and Excise — Declaration — Incorrect declaration — Shipping agent ('TCSB') declared in Customs manifest that containers contained window frames and high pressure cleaner when in fact they container branded lager beer — Whether TCSB's offence was a strict-liability one under s 133(1)(a) of Customs Act 1967 — Whether TCSB had raised reasonable doubt in prosecution's case to earn an acquittal by showing it had no means of knowing contents of the sealed containers but had made the declaration bona fide by relying on information provided by shipper

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Following a full trial, the magistrate's court acquitted and discharged Trans-Coastal Sdn Bhd ('TCSB') of two charges under s 133(1)(a) of the Customs Act 1967 of making an incorrect declaration with regard to goods contained in two sealed containers which were shipped to Port Klang from Vietnam. Upon their arrival, Customs officers seized the containers and on breaking their seals, found the containers to contain neither 'window frames' or 'high pressure cleaner', as declared, but several boxes of branded lager beer. As the two charges were tried separately, resulting in two decisions, the prosecution filed two separate appeals against the decisions to the High Court. Appeal 180 herein was the prosecution's appeal against the High Court's affirmation of TCSB's acquittal whilst Appeal 231 was TCSB's appeal against the High Court's recording of a conviction and imposition of a RM30,000 fine. The goods in the instant case had been shipped from Vietnam where the shipper had sealed the containers (to prevent tampering) after loading them with the cargo. For the preparation of the bill of lading, the shipper's agent had informed the local representative that one container contained window frames and that the other contained high pressure cleaner. It was based on this information, that TCSB made its declaration in the Customs manifest with respect to the goods contained in the containers. In Appeal 180, the prosecution argued that s 133(1)(a) of the Customs Act was a strict liability offence and the prosecution only had to prove the incorrectness of the declaration made by TCSB to found a conviction. In Appeal 231, TCSB, argued, inter alia, that it had no means of verifying the contents of the sealed containers before making the declaration and that construing s 133(1)(a) as a

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strict liability offence without taking into account TCSB's innocence was contrary to the Federal Constitution. A

Held, unanimously dismissing Appeal 180, allowing Appeal 231, setting aside the conviction and fine imposed on TCSB and ordering the fine paid by TCSB to be refunded: B

(1) Although ss 133(1)(a) and 52 of the Customs Act 1967 were strict liability offences, TCSB could prove its innocence by establishing that it had no knowledge of and could not verify the accuracy of the information provided by the shipper, vide the shipping instructions, which information was used to make the declaration in the Customs manifest. To deprive TCSB from relying on a valid defence was prejudicial and unjust to TCSB (see para 30). C

(2) TCSB had proven by way of documentary and oral evidence given by DW2 that the declaration to Customs was made based on information provided by the consignor agent in Vietnam. The information was believed to be true. Hence, DW2 filled up the Customs manifest, P4, in accordance with the information provided and declared it to Customs as such. TCSB had relied entirely upon the information provided by the shipper to make the declaration in P4 and was unaware whether the information provided was true or not. TCSB was not in a position to verify the contents of the sealed containers or confirm the accuracy of the information in the inward manifest as the information therein was provided by the shipper in Vietnam. The trial judge had made a finding of fact in this regard and was satisfied with the truth of DW2's evidence to absolve TCSB of blame. The trial judge's decision should be maintained and not be disturbed by this court (see paras 31, 34 & 42–43). D E F

(3) If shipping agents and/or freight forwarders were required to verify the contents of each container prior to their being sealed, this would impose an unnecessary burden on shipping agents like TCSB and be contrary to accepted international shipping industry norms (see para 32). G

(4) There was no misdirection on the part of the trial judge to warrant appellate intervention. When DW2 filled up P4 based on information provided by the shipper, the containers were sealed. TCSB could not verify the contents of the containers. The seals were only broken in front of the Customs officers. Thus, the declaration made by TCSB was done in a bona fide manner based on the information provided by the shipper. As a result, TCSB was entitled to seek the aid of this court as it had come to court with clean hands. TCSB had managed to discharge the burden of proof under s 119 of the Customs Act 1967 and the decisions of the trial court ought to be upheld (see para 51). H I

A **[Bahasa Malaysia summary**

Berikutan perbicaraan penuh, mahkamah majistret membebaskan dan melepaskan Trans-Coastal Sdn Bhd ('TCSB') daripada dua pertuduhan di bawah s 133(1)(a) Akta Kastam 1967 dalam membuat pengisytiharan yang salah berkenaan dengan barangan yang terkandung dalam dua kontena tertutup yang dihantar ke Pelabuhan Klang dari Vietnam. Setibanya barangan tersebut, pegawai Kastam merampas kontena itu dan apabila memecahkan penutupnya, mendapati bekas itu tidak mengandungi 'bingkai tingkap' atau 'pembersih tekanan tinggi', seperti yang diisytiharkan, tetapi beberapa kotak bir lager berjenama. Memandangkan kedua-dua pertuduhan itu dibicarakan secara berasingan, dengan dua keputusan, pihak pendakwaan memfailkan dua rayuan berasingan terhadap keputusan itu kepada Mahkamah Tinggi. Rayuan 180 di sini adalah rayuan pihak pendakwaan terhadap pengesahan Mahkamah Tinggi terhadap pembebasan TCSB manakala Rayuan 231 adalah rayuan TCSB terhadap sabitan yang direkodkan dan pengenaan denda RM30,000 oleh Mahkamah Tinggi. Barangan dalam kes semasa telah dihantar dari Vietnam di mana pengirim telah menutup kontena (untuk mengelakkan gangguan) selepas memuatkannya dengan kargo. Dalam penyediaan bil muatan, ejen penghantar telah memaklumkan wakil tempatan bahawa satu kontena mengandungi bingkai tingkap dan satu lagi mengandungi pembersih tekanan tinggi. Berdasarkan maklumat ini, TCSB membuat pengisytiharan dalam Kastam nyata berkenaan dengan barangan yang terkandung dalam kontena. Dalam Rayuan 180, pihak pendakwaan berhujah bahawa s 133(1)(a) Akta Kastam adalah kesalahan liabiliti yang ketat dan pihak pendakwaan hanya perlu membuktikan ketidaktepatan pengisytiharan yang dibuat oleh TCSB untuk mendapati sabitan. Dalam Rayuan 231, TCSB, berhujah, antara lain, bahawa ia tidak mempunyai cara untuk mengesahkan kandungan bekas yang ditutup sebelum membuat pengisytiharan dan dengan menganggap s 133(1)(a) sebagai kesalahan liabiliti yang ketat tanpa mengambil kira TCSB tidak bersalah bertentangan dengan Perlembagaan Persekutuan.

Diputuskan, sebulat suara menolak Rayuan 180, membenarkan Rayuan 231, mengetepikan sabitan dan denda yang dikenakan ke atas TCSB dan mengarahkan denda yang dibayar oleh TCSB dikembalikan:

(1) Walaupun ss 133(1)(a) dan 52 Akta Kastam 1967 adalah kesalahan liabiliti ketat, TCSB boleh membuktikan tidak bersalah dengan menetapkan bahawa ia tidak mengetahui dan tidak dapat mengesahkan ketepatan maklumat yang diberikan oleh pengirim, berdasarkan arahan penghantaran, maklumat yang digunakan untuk membuat pengisytiharan dalam manifes Kastam. Untuk menghalang TCSB daripada bergantung pada pembelaan yang sah adalah memudaratkan dan tidak adil kepada TCSB (lihat perenggan 30).

(2) TCSB telah membuktikan melalui keterangan dokumentari dan lisan yang diberikan oleh DW2 bahawa pengisytiharan kepada Kastam dibuat berdasarkan maklumat yang diberikan oleh ejen penghantar di Vietnam. Maklumat tersebut dipercayai benar. Oleh itu, DW2 mengisi manifes Kastam, P4, mengikut maklumat yang diberikan dan mengisytiharkannya kepada Kastam. TCSB telah bergantung sepenuhnya pada maklumat yang diberikan oleh pengirim untuk membuat pengisytiharan dalam P4 dan tidak mengetahui sama ada maklumat yang diberikan adalah benar atau tidak. TCSB tidak berada dalam kedudukan untuk mengesahkan kandungan kontena yang ditutup atau mengesahkan ketepatan maklumat dalam manifes masuk kerana maklumat di dalamnya disediakan oleh pengirim di Vietnam. Hakim perbicaraan telah membuat dapatan fakta dalam hal ini dan berpuas hati dengan kebenaran keterangan DW2 untuk membebaskan TCSB daripada kesalahan. Keputusan hakim perbicaraan harus dikekalkan dan tidak diganggu oleh mahkamah ini (lihat perenggan 31, 34 & 42–43).

(3) Jika ejen perkapalan dan/atau penghantar barang dikehendaki mengesahkan kandungan setiap kontena sebelum dimeterai, ini akan mengenakan beban yang tidak perlu kepada ejen perkapalan seperti TCSB dan bertentangan dengan norma industri perkapalan antarabangsa yang diterima (lihat perenggan 32).

(4) Tiada salah arah di pihak hakim perbicaraan untuk menjamin campur tangan rayuan. Apabila DW2 mengisi P4 berdasarkan maklumat yang diberikan oleh pengirim, kontena telah ditutup. TCSB tidak dapat mengesahkan kandungan kontena. Penutup itu hanya dipecahkan di hadapan pegawai Kastam. Justeru, pengisytiharan yang dibuat oleh TCSB dilakukan secara bonafide berdasarkan maklumat yang diberikan oleh pengirim. Akibatnya, TCSB berhak untuk mendapatkan bantuan mahkamah ini kerana ia telah datang ke mahkamah dengan suci hati. TCSB telah berjaya melepaskan beban pembuktian di bawah s 119 Akta Kastam 1967 dan keputusan mahkamah perbicaraan harus dikekalkan (lihat perenggan 51).]

Cases referred to

Ahmad Abdul Rashid & Anor v PP [1982] CLJ Rep 383; [1982] CLJ 417, HC (refd)

Herchun Singh & Ors v PP [1969] 2 MLJ 209; [1969] MLRA 382, FC (refd)

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2005] 2 MLRA 590, FC (refd)

QEL Shipping Services Sdn Bhd v Syed Embramsha & Co [2015] 1 LNS 1134, HC (refd)

The 'Axel Maersk' Atlas Electronics (Mal) Sdn Bhd v MV 'Axel Maersk', Owners & Others Interested [1980-1981] 1 SLR 467; [1980] 1 MLRH 80, HC (refd)

The 'American Astronaut'; 'American Astronaut' Owners & Ors v Kian Hin Hang (Pte) Ltd [1979] 2 MLJ 220, CA (refd)

Legislation referred to

Customs Act 1967 ss 52, 119, 133(1)(a), (2)

Appeal from: *Pendakwa Raya lwn Transcoastal Sdn Bhd* [2023] MLJU 2371 (High Court, Klang)

S Ravi Chandran (with Elaina Teng and KA Ramu) (Seah Balan Ravi & Co) for the appellant.

Aida Khairuleen bt Azli (with Mohd Fairuz bin Johari) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azmi Ariffin JCA:

INTRODUCTION

[1] Trans-Coastal Sdn Bhd in Appeal 180 was charged under s 133(1)(a) of the Customs Act 1967 for each container vide Klang Magistrate Court Criminal Cases Nos BL-87–4490–09 of 2017 and BL-87–4625–10 of 2017. Although both cases were similar in nature, the cases were not consolidated and were tried consecutively.

[2] At the end of the defence's case, on 11 November 2019, the learned sessions court judge exercising his powers as a magistrate, pronouncing two separate decisions acquitted and discharged Trans-Coastal Sdn Bhd of both the charges.

[3] Aggrieved, on 12 November 2019 the public prosecutor filed an appeal to the High Court wherein one appeal was before His Lordship and the other before Her Ladyship. Both appeal were heard at the Klang High Court.

[4] In Appeal 180 by the public prosecutor, His Lordship agreed with the findings of the trial judge and on 12 April 2022 dismissed the prosecution's appeal whereas Her Ladyship on 24 May 2023 in Appeal 231 allowed the prosecution's appeal and imposed a fine of RM30,000 against the respondent.

[5] Being dissatisfied with the decision by His Lordship in Appeal 180, on 22 April 2022, the public prosecutor filed an appeal to this court.

[6] Being dissatisfied with the decision by Her Ladyship in Appeal 231 Trans-Coastal Sdn Bhd thereafter applied for and obtained leave to appeal to the Court of Appeal.

[7] With the leave granted by the Court of Appeal, on 21 September 2023, Trans-Coastal Sdn Bhd filed a separate appeal to this court. **A**

[8] Since there were two conflicting High Court decisions based on similar factual and legal matrices, an application was made and an order obtained for both appeals (Appeal 180 and Appeal 231) to be heard together before us for determination. **B**

[9] To facilitate the determination of this two appeals, we find it more convenient to decide both the appeals in a single judgment as they are interrelated. **C**

[10] For ease of reference, the respondent (in Appeal 180)/appellant (in Appeal 231*)* would be referred to as 'Trans-Coastal Sdn Bhd' whereas the appellant (in Appeal 180)/respondent (in Appeal 231 would be referred to as 'the prosecution'. **D**

THE CHARGES

[11] The charge in Appeal 180 preferred against Trans-Coastal Sdn Bhd reads as follows: **E**

> Klang Magistrate Court Criminal Cases No: BL-87–4625–10 Tahun 2017
>
> Bahawa kamu Trans-Coastal Sdn Bhd (No Pendaftaran Syarikat B-259149M) lebih kurang 4.16 petang pada 8 Oktober 2015 di Pejabat Trans-Coastal Sdn Bhd. Yang beralamat di B-9–2, North Tower, BBT One, Lebuh Batu Nila 1, Bandar Bukit Tinggi, 41200 Klang, dalam Daerah Klang, dalam Negeri Selangor telah membuat pengikraran manifest masuk bernombor pendaftaran 41000268 yang dikehendaki oleh Akta 1967 yang mana pengikraran tersebut iaitu '1026 ct Window Frame' manakala sebenarnya dan pada hakikatnya 1182 kotak x 24 botol x 300ml Heineken Lager Beer' dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 133(1)(a) Akta Kastam 1967 dan boleh dihukum di bawah seksyen 133(1) Akta yang sama. **F** **G**

[12] The charge in Appeal 231 preferred against Trans-Coastal Sdn Bhd reads as follows: **H**

> Klang Magistrate Court Criminal Cases No: BL-87–4490–09 Tahun 2017
>
> Bahawa kamu, Trans-Coastal Sdn Bhd (No Pendaftaran Syarikat B-259149M) lebih kurang pukul 4.16 petang pada 8 Oktober 2015 di Pejabat Trans-Coastal Sdn Bhd yang beralamat di B-9-2, North Tower, BBT One, Lebuh Batu Nila 1, Bandar Bukit Tinggi, 41200 Klang dalam Negeri Selangor Darul Ehsan telah membuat pengikraran manifest masuk bernombor pendaftaran 41000268 yang dikehendaki oleh Akta Kastam 1967 yang mana pengikraran itu tidak benar dalam satu perkara iaitu ternyata dalam pengikraran tersebut '425 CT High Pressure Cleaner' **I**

manakala sebenarnya dan pada hakikatnya 1376 kotak x 12 botol x 650ml Heineken Lager Beer dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 133(1)(a) yang boleh dihukum di bawah seksyen 133(1) Akta yang sama.

FACTS OF THE CASE

[13] Trans-Coastal Sdn Bhd is a non-vessel owning common carrier operating from Malaysia that purchases slots on board a ship from vessel owners or from other slot owners for the shipment of containers either locally or internationally. Here, the vessel and/or slot owner was Advance Container Lines (Pte) Ltd. An ocean bill of lading will then be issued between the parties as confirmation of the contract.

[14] For international transactions, Trans-Coastal Sdn Bhd appoints local representatives in various countries to manage and obtain bookings from shippers and/or their agents. These local representatives would then obtain shipping information from the shippers and/or their agents which would then be sent to Trans-Coastal to comply with shipping documentation requirements.

[15] Trans-Coastal Sdn Bhd had appointed Hazel Wrights Co Ltd from Vietnam as their local representative who had obtained a booking from Freight Transport International Co Ltd as the agent for 3 Cans & Partners Company Limited ('3 Cans') to transport goods from the port in Vietnam to Klang Port in Malaysia.

[16] A shipment begins at the shipper's premises where the shipper would then load or stuff the cargo into the container and seal the container with a container seal, bearing a unique serial number, to ensure that the contents are not compromised.

[17] In Appeal 180 the seal serial number is HZWU05303 and in Appeal 231 the seal serial number is HZWU05276.

[18] In both appeals, the containers were seized by the Royal Malaysian Customs Department. The seals were intact and were not tampered with.

[19] Freight Transport International Co Ltd as agent of the shipper then provided the local representative, ie Hazel Wrights Co Ltd with the shipping instructions who will then forward the information to Trans-Coastal Sdn Bhd to prepare the house bill of lading.

[20] Based on the shipping instructions provided by Freight Transport

International Co Ltd to Hazel Wrights Co Ltd, container DRYU2502021 with the seal HZWU05303 contained 1026PKGS of window frames whereas container TEMU5109535 with the seal HZWU05276 contained 425 cartons of high pressure cleaner (see p 195, 197 *Jld* 4 Appeal 180) (collectively referred to as 'the containers').

[21] Upon arrival of the container at Port Klang Malaysia, the notify party, as listed in the bill of lading, ie Worldwise Freight (M) Sdn Bhd was notified of the arrival of the container.

[22] Worldwise Freight (M) Sdn Bhd was then required to pay the local charges to obtain the delivery orders from Trans-Coastal Sdn Bhd. These delivery orders were then to be used for the release of the containers from the said port. According to the bill of lading filled up by the consignor, the goods are stated as '1026ct Window Frame'.

[23] On 8 October 2015, the respondent bearing agent code JS0186 made the declaration in manifest No 41000268 which involves Bill of Lading AO TCLHCMPKL 1510011 and the container No DRYU25002021 (exh P4) in which it was declared that the content of the container to be window frames.

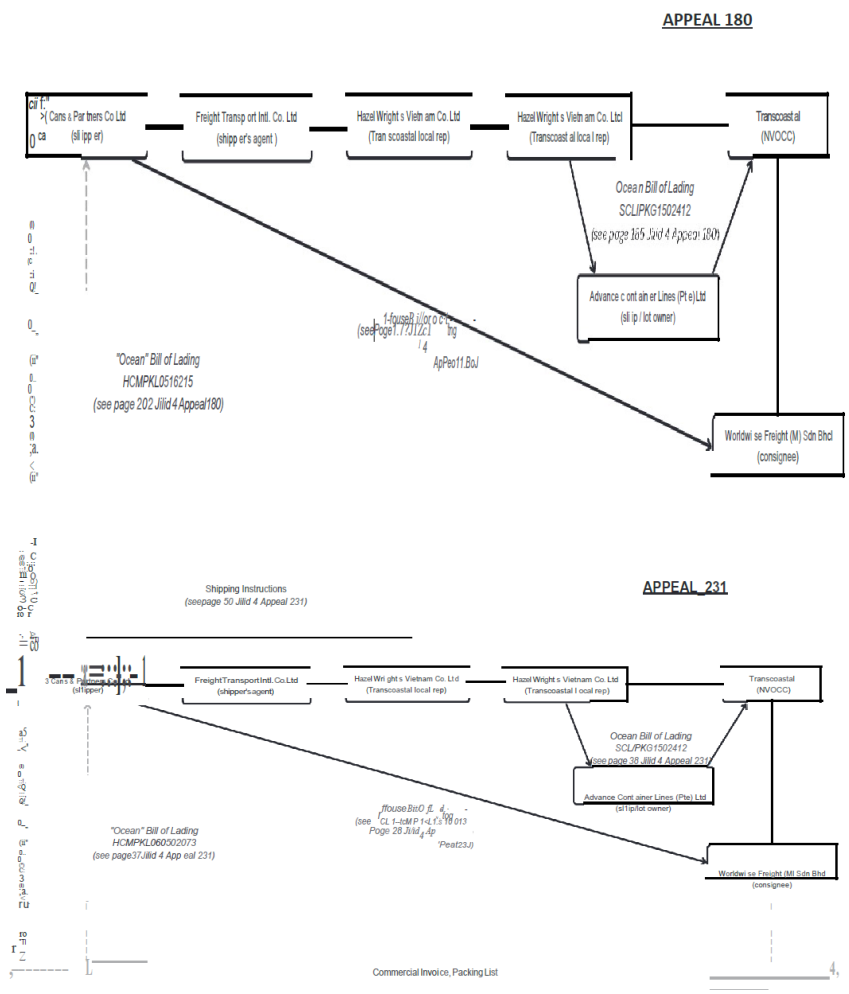
[24] However, before the containers could be released, the Royal Malaysian Customs Department had issued the notice of seizure for the containers.

[25] When the seals of both containers were broken and the containers opened for inspection, it was discovered that the containers did not contain 'Window Frames' or 'High Pressure Cleaners' but instead filled with liquor, Heineken Lager Beer 330ml which consists of 1182 boxes. Each box contained 24 bottles of the same.

[26] Trans-Coastal was thereafter charged under s 133(1)(a) of the Customs Act 1967 for each container vide Klang Magistrate Court Criminal Cases Nos: BL-87–4490–09 of 2017 and BL-87–4625–10 of 2017.

[27] As the shipment involved multiple parties, we will for convenience in this appeal, summarised and produced below an illustration of the transaction of the shipping instructions diagram for Appeal 180 and Appeal 231.

Diagram:



(a) the relevant provisions of law:

(i) s 119 of the Customs Act 1967 reads as follows:

> If in any prosecution in respect of any goods seized for non-payment of duties or for any other cause of forfeiture or for the recovery of any penalty or surcharge under this Act, any dispute arises whether the customs duties have been paid in respect of such goods, or whether the same have been lawfully imported or exported or lawfully landed or loaded, or concerning the place where such goods were brought or where such goods were loaded, or whether anything is exempt from duty under section then and in every such case the burden of proof there of shall lie on the defendant in such prosecution.

(ii) s 133(1)(a) of the Customs Act 1967 reads as follows:

133 Penalty on making incorrect declarations and on falsifying documents

(1) Whoever —

(a) makes, orally or in writing, or signs any declaration, certificate or other document required by this Act which is untrue or incorrect in any particular;

(b) makes, orally or in writing, or signs any declaration or document, made for consideration of any officer of customs on any application presented to him, which is untrue or incorrect in any particular;

(c) counterfeits or causes to be counterfeited or falsifies or causes to be falsified any document which is or may be required under this Act or used in the transaction of any business or matter relating to customs, or uses or causes to be used or in any way assists in the use of such counterfeited or falsified document;

(d) fraudulently alters any document, or counterfeits the seal, signature, initials or other mark of, or used by, any officer of customs for the verification of any such document or for the security of any goods or any other purpose in the conduct of business relating to customs;

(e) being required by this Act to make a declaration of dutiable goods imported or exported, fails to make such declaration as required;

(f) fails or refuses to produce to a proper officer of customs any document required to be produced under section 100; or

(g) being so required under section 87A fails to make a declaration in the prescribed form, within the stipulated period thereunder, of goods imported or exported shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding seven years or to both.

(2) When any such declaration whether oral or written, or any such certificate or other document as is referred to in paragraphs (1)(a), (b) and(c) has been proved to be untrue or incorrect or counterfeited or falsified in whole or in part, it shall be no defence to allege that such declaration, certificate or other document was made or used inadvertently or without criminal or fraudulent intent, or that the person signing the same, was not aware of, or did not understand the contents of, such document, or where any declaration was made or recorded in National Language or in English by interpretation from any other language, that such declaration was misinterpreted or not fully interpreted by any interpreter provided by the declarant.

(3) For the purposes of this section, 'falsified' in relation to a document shall be deemed to include a document which is untrue or incorrect in any material particular, and 'falsifies' has a similar meaning.

(iii) s 52 of the Customs Act 1967 reads as follows:

52 Master or agent of arriving vessel to present complete manifest

> (1) The master or agent of every vessel, other than a local craft, arriving in any customs port shall, not less than twenty-four hours arriving in any customs port shall, not less than twenty-four hours before its arrival, or such period as the Director General may determine, whichever is lesser, present to the proper officer of customs a true and complete manifest of the whole cargo of the vessel in the national language or English language, in the prescribed form, and certified by such master or agent.
>
> (2) ...
>
> (3) ...
>
> (4) Any person who contravenes subsection (1), (2) or (3) shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding one hundred thousand ringgit or to both.

(b) main grounds of appeal by prosecution in Appeal 180:

(i) strict liability offence;

(ii) Trans-Coastal Sdn Bhd had made an untrue declaration against the manifest;

(iii) Trans-Coastal Sdn Bhd had failed to name the recipient of the consignment making Trans-Coastal Sdn Bhd's defence an afterthought and incredible; and

(iv) Trans-Coastal Sdn Bhd is liable under the law to make a declaration that is correct and valid, that is by inspecting the goods before the declaration is made.

(c) main grounds for appeal by Trans-Coastal Sdn Bhd in Appeal 231:

(i) the conflict with accepted international shipping industry norms;

(ii) consequences of adopting a strict interpretation;

(iii) no obligation to verify the contents should be imposed on the shipping agent; and

(iv) s 133(1)(a) of the Act as a strict liability offence is contrary to the Federal Constitution.

OUR DECISIONS

[28] For an offence under s 133(1)(a) of the Customs Act 1967, the essential ingredient that need to be proven by the prosecution was well laid out in *Ahmad Abdul Rashid & Anor v Public Prosecutor* [1982] CLJ Rep 383; [1982] CLJ 417 where Mohd Yusof Abdul Rashid J held as follows:

Under s 133(1)(a) of the Customs Act, only two ingredients have to be proved, that is to say —

(i) that the accused made an oral declaration required under the Customs Act; and

(ii) that the declaration was untrue or incorrect in any particular.

In *Public Prosecutor v Yong Nam Seng & Anor* [1964] MLJ 85 at p 87, Azmi J (as he then was) held that 'for the purpose of s 129(1) of the Customs Ordinance it is sufficient for the prosecution to prove that a declaration has been made and that the particulars in such declaration are untrue or incorrect. Section 129(1) referred to in that judgment has been renumbered as s 133(1)(a) in the re-enacted Customs Act 1967.

From the evidence adduced, fresh fruits when they entered the Federation from Singapore. However, upon examination five cartons of Kodak photographic processing papers were conveyed in the said car.

[29] The prosecution contended that ss 133(1)(a) and 52 of the Customs Act 1967, is a strict liability offence. Hence, the manifest declaration must be a truthful declaration and the prosecution is only required to prove that the declaration made is untrue or incorrect for the respondent to be implicated of the charge based upon the provision of s 133(2) of the same Act.

[30] We agreed that ss 133(1)(a) and 52 of the Customs Act 1967 is a strict liability offence. However, there are still defences available to Trans-Coastal Sdn Bhd to rely on to prove its innocence by establishing that it had no knowledge nor could it verify the accuracy of the information provided by the shipper, vide the shipping instructions, used in the inward manifest. To deprives Trans-Coastal Sdn Bhd from relying on a valid defence will certainly cause prejudiced and injustice to the Trans-Coastal Sdn Bhd if their right to do is completely shut.

[31] More so when Trans-Coastal Sdn Bhd has proof by way of documentary and oral evidence given by DW2 that the declaration made was based on the representation from the information provided by the consignor agent based in Vietnam with the information believed to be true, DW2 hence filled up P4 in accordance with information provided and declared to the customs as such. Trans-Coastal Sdn Bhd had relied entirely upon the information provided by the agent to make the declaration as found in P4 and not being aware of whether the information provided by the consignor agent to be true or not.

[32] If the shipping agents and/or freight forwarders are required to verify the contents of each container prior to sealing, this will certainly impose unnecessary burden on the shipping agent (Trans-Coastal Sdn Bhd) to verify the contents of the container to ensure that the consignment brought in, is

A imported or exported legally before making the declaration in the manifest. To us, placing such additional burden on the shipping agent will certainly be in conflict with accepted international shipping industry norms, even though we fully realised that industry norms cannot supersede statutory requirements.

B **[33]** With great respect, Her Ladyship's erred when she had failed to conduct a detailed consideration of Trans-Coastal Sdn Bhd's defence in coming to her finding whether Trans-Coastal Sdn Bhd knew that the contents of the container were the same as what was declared, was not a defence.

C **[34]** Further, there is no dispute that Trans-Coastal Sdn Bhd had made the manifest declaration in Form K4 nor did they deny being aware of or the contents of the declaration. However, in our considered view Trans-Coastal Sdn Bhd were not in a position to confirm the accuracy of the contents of the inward manifest as the information therein was provided by the shipper in Vietnam. Hence to say that Trans-Coastal Sdn Bhd's defence was an afterthought and incredible, with respect cannot hold water.

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E **[35]** Reliance is made in the Singapore case of *The 'Axel Maersk' Atlas Electronics (Mal) Sdn Bhd v MV 'Axel Maersk', Owners & Others Interested* [1980-1981] 1 SLR 467; [1980] 1 MLRH 80, where Rajah J accepted the evidence of the witness and said as follows:

> On the Bill of Lading I accepted the evidence of Mohamed bin Hamzah, the Operations Engineer of the Maersk Line. He said:

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> I am familiar with this form of bill of lading. On the fact of it the shipper has shipped a container the cargo of which appears to be stated therein. This is a CY/CY bill of lading (Container Yard/Container Yard). It is an FCUFCL (Full Container Load). A CY/CY equates to an FCUFCL. In this situation the container would belong to or be leased by the carriers. Maersk Line only undertakes to send an empty container to the shipper when the shipper himself will stuff the container without any representative from Maersk Line being present. We will also give one of the Maersk seals to the shipper. On completion of stuffing the shipper will seal up the container. From the shippers' premises to the ship is the responsibility of the shipper. From the quay side the container is loaded on to the ship. We ourselves would not know what the contents of the container are or the condition of the contents. We accept what is given by the shipper as the contents. Shipped in apparent good order and condition, this only refers to the container and not what is inside it ...

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I **[36]** This was also similarly confirmed by an independent witness from the Shipping Association of Malaysia, Seah Eng Hwa (SD3), wherein he gave the following evidence:

> ... Apabila hari semakin hampir ketibaan kapal, shipper akan kosongkan satu kontena daripada shipping line depot. They will use their agent and bring the

container to the shipper/consignor and this empty container will be fill by the consignor/shipper. Once the container is fill they will seal it and made arrangement with the landed container to truck into the terminal where the ship will be berthing at the port. Meanwhile the shipping consignor will submit a shipping instruction to the carrier. This shipping instruction is the description of the cargo that they have put into the container. This information also consists of the seal number that they seal the container ... (see encl 8 p 91 Vol 3 record of appeal).

SD3 further said:

Whereby the empty container will be park at the shipper premises for stuffing of their cargo. Once this cargo has been stuffed, the shipper will seal the container with the seal provided. Subsequently the shipper will arrange for the landen container to be delivered to port / terminal for loading on to the vessel. Consignor/ shipper will provide shipping instruction (SI) to the shipping line, This SI contains description, quantity, weight and volume of the cargo (encl 8 p 140 Vol 3 record of appeal).

[37] The above evidence obviously shows that Trans-Coastal Sdn Bhd was in no position to verify the contents of the container nor the accuracy of the information provided and further according to SD3 no party would be able to confirm the content of the container with only the shipper having the capacity to do so.

[38] This is illustrated by the industry practice of the notation 'STC' or 'Said to Contain' on the bills of lading (encl 9 p 31 and p 39 Vol 4 record of appeal) and recognised by the courts as reflected in the case of *QEL Shipping Services Sdn Bhd v Syed Embramsha & Co* [2015] 1 LNS 1134 wherein the court held as follows:

Selain itu, defendan tidak mempunyai pengetahuan berhubung kontena yang mengandungi barangan plaintiff tersebut kerana ianya bermeterai dan defendan tidak bertanggungjawab memeriksa kuantiti dan jenis barangan berkenaan. Oleh itu, juga catatan pada 'Bill of Lading' iaitu Shipper Load & Count STC ('said to contain') adalah jelas menunjukkan bahawa *defendan hanya mengambil maklum apa yang dicatatkan pada 'Bill of Lading' tersebut* tanpa memeriksa kuantiti dan kandungan sebenar barangan berkenaan. (Emphasis added).

[39] This view was further propounded by the case of *The 'American Astronaut'; 'American Astronaut' Owners & Ors v Kian Hin Hang (Pte) Ltd* [1979] 2 MLJ 220 wherein the Singapore Court of Appeal through the judgment delivered by Wee Chong Jin CJ (as he then was) held as follows:

Page 221 of the case report:

The notation 'Shipper's load, stowage and count' means the shippers themselves packed the container, stow them and count them without any representatives from

A the shipping line concerned and the subject container is sealed by the shippers themselves.

Page 222 of the case report:

B In these circumstances the master or his agent would have no opportunity of examining or finding out anything about the contents of the said container. Hence, the notations by the carrier as they appear on the said bill of lading.

Page 222 of the case report:

C The two qualifying notations used on the said bill of lading are now *well understood recognized and acted upon by banking, shipping and trading communities throughout the commercial and shipping world*. The said notations are used in connection with container transport and *do not relate to goods which the master or his authorized agent could reasonably see and check before the bill of lading is signed either by him or his* D *authorized agent*. The learned trial Judge failed led to appreciate that *the notation used here were in respect of a container packed, sealed and loaded on the vessel by either the shipper or his agent and not in connection with cargo which could have been seen and checked*. (Emphasis added.)

E **[40]** The Singapore Court of Appeal had then proceeded to cite from *Tetley on Marine Cargo Claims* (2nd Ed) which reads as follows:

The phrase 'Shippers load stowage and count' used in reference to containers, however, is a proper form of qualification where the carrier cannot verify the F contents of the container packed and sealed by the shipper.

[41] On the approach to be taken in dealing with this kind of situation that has arisen, the learned sessions court judge recognised the role of Trans-Coastal Sdn Bhd when he briefly held as follows:

G Berasaskan kepada ikrar tidak benar OKS dalam Borang K4 (P4) maka mahkamah telah putuskan bahawa pendakwaan telah berjaya membuktikan satukes prima facie terhadap OKS dan OKS telah diarah untuk membela diri terhadap pertuduhan yang dikenakan ke atas beliau.

H Pada peringkat ini pihak pembelaan telah mengemukakan tiga orang saksi dan 13 ekshibit. Di dalam pembelaannya OKS menerusi SD2 iaitu kakitangan yang dipertanggungjawabkan oleh OKS untuk membuat pengikraran Borang K4 (P4) kepada Kastam memberitahu mahkamah bahawa bagi membolehkan beliau mengisi butir-butir yang diperlukan di dalam Borang K4 (P4), beliau telah memperolehi maklumat. Maklumat berhubung kandungan kontena tersebut I daripada agen konsignor yang berada di Vietnam.

Berasaskan emel yang diterima dariapda agen konsignor yang berada di Vietnam, beliau dengan suci hati tanpa ragu-ragu kesahihan maklumat yang diberikan oleh agen konsignor telah mengisi maklumat yang diberi oleh agen tersebut ke dalam Borang K4 (P4) sebelum mengisytiharkan Borang K4 (P4) kepada Kastam tanpa

mengetahui/melihat isi kandungan yang diisi ke dalam kontena tersebut.

Pada sepanjang masa OKS yang bertindak sebagai agen kepada konsignor telah bertindak dengan suci hati dan mempercayai bahawa butir-butir yang diberikan oleh agen konsignor daripada Vietnam itu adalah benar, telah mengisi Borang K4 (P4) dan mengikrarkannya kepada Kastam. Malah SD2 sendiri telah hadir semasa seal kontena itu dipecahkan oleh Kastam untuk melihat sendiri kandungannya yang ada di dalam kontena tersebut. Fakta ini tidak langsung dicabar oleh pihak pendakwaan.

Berasaskan fakta bahawa SD2 yang mengikrarkan Borang K4 (P4) berdasarkan representasi daripada maklumat yang diberikan oleh agen konsainor yang berada di Vietnam dan maklumat yang diberi oleh agen tersebut dipercayai oleh SD2 adalah benar maka berasaskan mak!urnat itu maka SD2 telah mengisi butir-butir yang diberikan oleh agen konsignor daripada Vletnam itu ke dalam Borang K4 (P4) dan mengikrarkannya kepada Kastam atas andaian bahawa maklumat itu adalah benar.

Berdasarkan hujah ini mahkamah mendapati pihak pembelaan telah berjaya membuktikan satu kes keraguan yang munasabah terhadap kes pendakwaan di mana kesahihan maklumat yang diberikan oleh agen daripada Vietnam itu boleh dipertikaikan dimana pihak OKS tidak tahu samada maklumat yang diberi oleh agen daripada konsalnor yang berada di Vietnam itu benar atau tidak. OKS bergantung sepenuhnya kepada maklumat yang diberi oleh agen itu untuk mengikrarkan Borang K4 (P4).

Oleh yang demikian mahkamah mendapati OKS tidak bersalah dan dilepaskan dan dibebaskan daripada pertuduhan

[42] In short, the learned trial judge relied upon the evidence of DW2 who was entrusted with the responsibility to fill up the details in Form K4 ('P4'). DW2 hence filled up P4 in accordance with the information provided and gathered from the consignor agent based in Vietnam and declared to the customs as such. The details in the manifest declaration was made in the belief that they were true, hence Trans-Coastal Sdn Bhd in the role of agent should be absolved from blame.

[43] The learned trial judge had made the finding of fact and was satisfied and convinced of the truth of the statement made by DW2. Hence, his decision should rightly be maintained and not to be disturbed by this honourable court.

[44] In *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209; [1969] MLRA 382, Ong Hock Thye CJ (as he then was) said as follows:

An appellate court should be slow in disturbing such finding of fact arrived at by the judge, who had the advantage of seeing and hearing the witness, unless there are substantial and compelling reasons for disagreeing with the finding.

[45] In *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2005] 2 MLRA 590, the Federal Court held as follows:

> Now, it settled law that it is no part of the function of an appellate court in a criminal case — or indeed any case — to make its own findings of fact. That is a function exclusively reserved by the law to the trial court. The reason is obvious an appellate court is necessarily fettered because it lacks the audio-visual advantage enjoyed by the trial court.

[46] Further, it was also proven through the evidence of SP1 (Gun Kee Sin) that when the container was opened by the Royal Malaysian Customs Department the seals affixed by the shipper was not tampered with.

[47] SP1 in his witness statement (PSP1) below said as follows:

> J2: Pada masa tersebut saya bertugas di Cawangan Operasi Bahagian Penguatkuasaan Jabatan Kastam Diraja Malaysia, Selangor.
>
> S4: Boleh beritahu Mahkamah apa tugas-tugas yang encik lakukan pada hari itu?
>
> J4: Atas arahan pegawai penyiasat Tuan Rabinderanath, saya bersama-sama Pik (P) 10438, 12566, 7879 dan 12489 telah pergi ke stor Penguatkuasaan di Pelabuhan Barat bertujuan membuat pemeriksaan ke atas Kontena TEMU5109535.
>
> S5: Boleh ceritakan tentang pemeriksaan tersebut?
>
> J5: Semasa membuat pemeriksaan, saya telah memecahkan seal pada kontena tersebut dan membuka pintu hadapan kontena. Apabila pintu dibuka, saya tengok di dalamnya bermuatan kotak- kotak yang mengandungi beer jenama Heineken. Saya buka dan tengok dalam 1 kotak mengandungi 12 botol x 650 ml beer jenama Heineken.
>
> (see encl 8 p 2 Vol 3 record of appeal).

[48] During cross-examination, SP1 said:

> Seal kontena dalam keadaan sempurna tanpa di ceroboh (tempered).

(see encl 8 p 45 Vol 3 record of appeal).

[49] DW2 was also in fact present when the seal of the container was broken to observe the content of the container and this fact was not challenged by the prosecution. In this respect, we find it material to reproduced below the answer given by DW2 (Mohd Saufi bin Mohd Said) in his witness statement (PSP2):

> S3: Adakah encik mempunyai pengetahuan mengenai kes ini?
>
> J3: Ya, sebelum Encik Kim menyertai SKT, saya telah mengendalikan kes ini bagi pihak SKT. Saya juga adalah wakil SKT yang hadir apabila meterai ('seal') kontena-kontena yang disita, iaitu DRYU 2502021, TEMU 5109535 and TEMU

5156100, telah dipecah untuk memeriksa kandungannya.

S4: Berapa kontena yang disita oleh pihak Kastam Diraja Malaysia yang dimiliki oleh SKT?

J4: Melalui surat bertarikh 24.11.2015, Kastam Diraja Malaysia telah menyita tiga (3) kontena yang dimiliki oleh SKT iaitu kontena DR.YU 2502021, TEMU 5109535 and TEMU 5156100. Kes ini melibatkan kontena TEMU 5109535.

S5: Apakah sebab kontena tersebut telah disita?

J5: Semasa kami menerima surat tersebut, kami tidak tahu sebab kontena tersebut disita. Kami hanya dimaklumkan untuk menghadiri pemecahan meterai kontena untuk pemeriksaan kandungannya. Hanya selepas kontena tersebut dibuka bahawa kami mendapati bahawa kontena tersebut tidak mengandungi 'High Pressure Cleaner' seperti yang dinyatakan dalam Bil Muatan ('Bill of Lading') tetapi sebaliknya mengandungi karton- karton minuman keras/bir.

S6: Pada masa pemecahan meterai kontena, adakah meterai tersebut diusik?

J6: Pada masa pemecahan meterai kontena, meterai asal tidak diusik dan/atau dipecah dan masih berada adalam keadaan asalnya.

S7: Siapakah yang hadir semasa pemecahan meterai kontena tersebut?

J7: Pada masa itu, terdapat lebih kurang lima (5) pegawai-pegawai Kastam Diraja Malaysia tetapi wakil penerima konsainan ('consignee'), iaitu Worldwise Freight (M) Sdn Bhd, tidak hadir pada masa itu memandangkan bahawa ia merupakan perkara biasa untuk semua pihak yang terlibat untuk hadir untuk pemecahan meterai oleh pihak Kastam. Akan tetapi, saya tidak ingat nama pegawai-pegawai Kastam yang hadir pada hari itu.

S8: Boleh encik terangkan apa yang telah berlaku pada masa meterai kontena-kontena tersebut dipecah?

J8: Pada masa itu, pegawai Kastam telah mengambil gambar meterai kontena-kontena tersebut Setelah habis mengambil gambar, pihak Kastam telah memecah meterai tersebut dan membuka kontena-kontena tersebut dan mengambil gambar kandungan kontena tersebut. Pihak Kastam seterusnya mengeluarkan satu karton dan mengambil satu sampel untuk ujian dan pengesahan daripada Jabatan Kimia. Kontena-kontena tersebut ditutup dan dimeterai semula.

Susulan daripada itu, kami dipanggil semula untuk memecah meterai yang dipasang selepas pemecahan meterai asal untuk menyaksikan pengeluaran kandungan kontena-kontena tersebut dimana selepas itu, kontena-kontena tersebut ditutup dengan mangga pihak Kastam.

S9: Adakah kandungan kontena tersebut dikeluarkan secara keseluruhannya semasa pemeriksaan kontena?

J9: Pemeriksaan secara keseluruhan kandungan kontena tersebut tidak dijalankan semasa pemecahan meterai asal kontena- kontena tersebut. Selepas meterai asal kontena tersebut dipecah, pegawai Kastam telah memeriksa kontena tersebut sekadar melihat dan mengambil satu sampel sahaja. Pegawai Kastam lain telah mengambil gambar dari pintu kontena tersebut ke dalam kontena tersebut dan

selepas itu kontena tersebut dimeterai semula.

[50] In this context, it is significant to emphasise that DW2's evidence undoubtedly speak volume, truly acceptable and credible. A scrutiny of His Lordship judgment revealed that he had judicially considered the defence and weigh all their evidence before coming to a definite conclusion that the learned trial judge had not erred in facts and law in arriving at the decision that the defence has cast reasonable doubt in the prosecution case. In this regard, we find ourselves in agreement with His Lordship's decision.

CONCLUSION

[51] Having appraised ourselves of the relevant documentary evidence before us the oral and written submission made by both parties, we unanimously find that there was no misdirection on the part of the learned trial judge that warrants appellate intervention.

(a) for Appeal 180, when DW2 filled up K4 or the declaration form based on information provided by the shipper, the container was sealed. We accept the argument put forward by the Trans-Coastal Sdn Bhd's learned counsel that the agent cannot verify the content of the container. The sealed was only broken in front of the Customs Officers. Thus, the declaration made by Trans-Coastal Sdn Bhd was done in a bona fide manner based on the information provided by the shipper. As a result, Trans-Coastal Sdn Bhd's is entitled to seek the aid of this honourable court as they have come before us with a clean hand. Trans-Coastal Sdn Bhd has managed to discharged the burden of proof under s 119 of the Customs Act 1967. His Lordship's decision is hereby affirmed and the prosecution appeal in Appeal 180 be dismissed; and

(b) for Appeal 231, we find real substance in this appeal to merit our interference. Trans-Coastal Sdn Bhd's appeal against conviction is allowed. Sentence of fine imposed by the Her Ladyship is set aside. Fine paid to be refunded to Trans-Coastal Sdn Bhd.

Appeal 180 dismissed; Appeal 231 allowed; conviction and fine imposed on TCSB set aside; and fine paid by TCSB ordered to be refunded.

Reported by Ashok Kumar